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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners,

v.

WESLEY E. STEINER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Several equal protection issues were raised by petitioners during the course of proceedings below. No equal protection issues now appear among petitioners' statement of the questions presented. Respondents consider those issues abandoned. Rule 21.1.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 44, 45, 51

Vlandis v. Kline, 412 U.S. 441 (1973) 51

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based upon an incorrect construction of prior Arizona law. Their discussion does not relate at all to their other arguments on irrebuttable presumption and incorporation of Initial Active Management Area maps.

Therefore, respondents will not now take issue with petitioners' characterization of the Act point by point, but some of the more inaccurate statements are footnoted.[1]

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[1] Petitioners state on page 14 that "[w]ith respect to non-irrigation (developmental) uses. . . . a landowner within an AMA [Active Management Area] who was not withdrawing groundwater on June 12, 1980 may not do so in the future." [Emphasis original.] On page 19 they state that "[t]he Act denies to landowners not pumping groundwater on June 12, 1980 any right to do so in the future." Both of these statements are untrue. Indeed on page 15, petitioners acknowledge specific ways to obtain the right to use groundwater for new uses on their lands. They mention some of those alternatives and remark that "[t]hese alternatives share one common characteristic -- all involve the purchase of water, water rights or land from others." But in failing to (Footnote continued)

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STATEMENT OF THE CASE

Petitioners' statement of the case is largely a summary of selected provisions of the 1980 Arizona Groundwater Management Act, 1980 Ariz. Sess. Laws, 4th Spec. Sess., Ch. 1 ("1980 Act" or "Act").

Accurate summaries of the scope and structure of the Act are included in both the District Court's opinion below and the opinion of the Arizona Supreme Court in Town of Chino Valley v. City of Prescott (Chino Valley II), 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101 (1982). Petitioners' summary and argument contain several significant errors both in stating what the Act provides and in describing the effect of the Act on rights alleged to exist prior to its passage.

Petitioners' discussion leaves misimpressions of the Act, but it does not relate to their primary argument, which is

(Footnote 1 continued)

mention several other alternatives, petitioners mischaracterize the Act. For example, petitioners may drill wells for their domestic use. § 45-454 [All statutory references are to Arizona Revised Statutes (Cum. Supp. 1983-84) unless otherwise indicated.] They may subdivide their land and pump water to serve the subdivided lots upon demonstrating that an assured water supply exists for such subdivision. § 45-576; 45-591; 45-402.24. And petitioners may apply for a permit to drill wells and pump groundwater. Permits are available for any non-irrigation water use except those that will be served by a municipal or private water company. See, e.g., §§ 45-512 to 45-519.

Petitioners state that "out of those actually drawing or using groundwater on the date of the AMA's creation, only three classes of persons are permitted to continue to do so." (Pet. at 4.) They fail to mention that the classes of persons permitted to continue include every person who was actually drawing and using groundwater as of the effective date of the Act. § 45-462.A.

Petitioners then state that "some, but not all, of the private landowners who had withdrawn or used groundwater in the AMA prior to its establishment" may continue to use groundwater but only if they "qualify for one of three types of 'grandfathered right.'" (Pet. at 4.) Again the Act is mischaracterized. First, everyone who was using groundwater as of the effective date of the AMA may continue to do so. In addition, land irrigated at (Footnote continued)

(Footnote 1 continued)

any time in the prior 5 years may be irrigated. § 45-465.A. Anyone who had not irrigated land but who, by the effective date of the AMA, had made a substantial capital investment toward the subjugation of land is also entitled to a grandfathered right for such land. § 45-452.A. Any person who had a non-irrigation use that had not been fully exercised in the year prior to the creation of the AMA is entitled to a grandfathered right equal to the amount of water that would normally have been used on a full year basis. § 45-464.D. Second, not all persons using groundwater on the effective date of the AMA need qualify for a grandfathered right in order to continue to do so. Domestic wells are exempt, and users of groundwater who are customers of municipal and private water companies need not obtain grandfathered rights. §§ 45-454; 45-492. Third, the 3 categories of grandfathered rights encompass all remaining types of groundwater uses. § 45-462.D.

Petitioners also imply that water companies have unlimited pumping rights. (See Pet. at 4, 15, 19.) This is not so. The ability of water companies to withdraw water is narrowly circumscribed. Water companies may drill wells only within their service areas. § 45-491; 45-492.A. A water company's service area includes only the area where it is providing actual service to customers, which area may be only a portion of the entire area for which it is certificated by the Arizona Corporation Commission to provide service. § 45-402.25. Petitioners state that "[i]f

(Footnote continued)

(Footnote 1 continued)

the holders of 'irrigation rights' own land in such a service area, and desire to devote the land to non-agricultural purposes, the right to use groundwater is lost." (Pet. at 4 n.6.). On page 14, petitioners assert that "[t]he Act permanently eliminates for that individual all other options for use of the land if it lies within a water company's service area." These statements are erroneous. The owner has every option for the non-irrigation development of his property that is available to other landowners within the service area, and there are several means by which groundwater may be used on the land, the most obvious being use of groundwater provided by the water company. The landowner has the further option of returning his land to irrigation.

Petitioners argue that "[t]he transportation of ground water away from the land from which it was pumped will subject the transporter to an award of damages only in very limited instances." (Pet. at 5; see also Pet. at 15.) To the contrary, the transportation of groundwater out of the common hydrologic sub-basin in which it occurs will subject the transporter to damages in every instance except where the transportation is supported by the retirement of an irrigation use in the source basin. §§ 45-541 to 45-545.

While respondents have not controverted the affidavits of petitioners concerning their specific fact situations, respondents have never conceded the conclusions petitioners draw from those affidavits. (Footnote continued)

(Footnote 1 continued)

(Pet. at 6.) To the contrary, respondents pointed out to the District Court in the very early stages of this proceeding that if the facts alleged by petitioners are true, petitioners would be allowed under the Act "to develop their lands for the most part as they intended." (CR 37 at 9.)

groundwater percolating beneath their land and that the Act expropriated their water. The Arizona Supreme Court analyzed the nature of a landowner's interest in unpumped groundwater prior to the Act in Town of Chino Valley v. City of Prescott (Chino Valley II), 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed, 457 U.S. 1101, (1982). The court unanimously concluded:

> [T]here is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and . . . the right of the owner of the overlying land is simply to the usufruct of the water. 131 Ariz. at 82, 638 P.2d at 1328.

Accordingly, the Arizona court rejected a claim that the 1980 Act effected a taking of property in violation of the Fifth and Fourteenth Amendments. That decision was then appealed to this Court. Both the contention that the 1980 Act took property without just compensation, and the contention that the decision of the

Arizona court in Chino Valley II itself was such a departure from previously settled Arizona law as to deprive persons of property without due process of law, were among the questions presented in the Jurisdictional Statement in the appeal. The appeal was dismissed for want of a substantial federal question.

In addition, both the District Court and Court of Appeals in the proceedings below independently reviewed Arizona case law and unanimously found petitioners' assertions to be without merit. Cherry v. Steiner, 543 F. Supp. 1270, 1277-78 (D. Ariz. 1982), aff'd, 716 F.2d 687, 692 (9th Cir. 1983).

Petitioners' irrebuttable presumption argument is also initially premised on their interpretation of state law, i.e., the 1980 Act required that land included within Initial Active Management Areas must satisfy one of the criteria for

establishment of Subsequent Active Management Areas. There is no constitutional requirement that Initial Active Management Areas created legislatively, and Subsequent Active Management Areas created administratively, must be established on the same criteria. Nor do petitioners appear to urge such a proposition. The proper due process question on the creation of the Initial Active Management Areas is whether a rational basis existed for a legislative determination to regulate groundwater use in the areas of the State designated for management. The District Court's opinion, adopted by the Court of Appeals, found that "the legislative history is full of support for this legislative categorization." 543 F. Supp. at 1278. Petitioners do not contest this finding. Instead, they assert that the Act itself requires that Initial and Subsequent

Active Management Areas meet the same criteria. This argument, which requires the Court to make an erroneous interpretation of a state statute, was heard and rejected without comment by both the District Court and the Court of Appeals. Even if petitioners' reading of the Act were conceded, the irrebuttable presumption doctrine does not apply to economic regulations such as the 1980 Act.

Finally, petitoners attack the Act as having been incomplete on the date of its enactment. The Act operates by reference to maps on file with Arizona's Secretary of State that depict the boundaries of the Initial Active Management Areas created by the Act. Petitioners assert that the maps were not on file at the precise instant the Governor signed the bill, but were filed on the same day shortly after the signing; they therefore contend that the Act is void. The maps were undisputedly

in existence prior to the bill's enactment. Whether a statute may operate by reference to external documents in existence on the date of enactment is a question of state law. The courts below properly found as a matter of state law that the maps were validly incorporated.

This Court generally refrains from examining state law issues when the District Court and Court of Appeals have concurred in their determination. The questions presented here are state law questions that this Court should not consider.

Moreover, it is unnecessary to review the decision of the Court of Appeals because it correctly sustained the 1980 Act on the merits.

Although petitioners do not state clearly the nature of their asserted rights under prior law, the right they impliedly claim would authorize every

landowner in the State to pump every drop of water that could be found beneath his land and every drop of water that could be drawn to his land from the land of his neighbors in the same basin, and to do so with impunity so long as the water is withdrawn for the beneficial use of his land.

In fact, this could be done under prior law.[2] But this unlimited ability to pump groundwater was not a vested property right. Further, the Arizona Supreme Court placed groundwater users on notice from the beginning that the time would come when demand would outstrip supply and the

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[2] The only exception was that under the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5, the drilling of new wells for irrigation could be prohibited in areas of the State designated by the State Land Department as having insufficient water for irrigation of the lands then in cultivation. Petitioners' lands were not in such an area.

Legislature would be forced to restrict uses and to allocate supplies.

Arizona currently consumes surface water and groundwater equivalent to 171% of annual replenishment. (CR 38 at 4-5.) Groundwater alone is consumed at 7 times the rate of replenishment. (Id.) Irrigation accounts for 89% of the State's total water consumption. (Id.) Yet barely 3% of the State's arable land is in irrigation. (CR 37 at 27.) These few statistics illustrate the disaster that would befall the State if it were unable to restrict and manage the use of groundwater without compensating every landowner who might have had the expectation of an unrestrained ability to pump groundwater.

Regardless of the nature of a landowner's interest in unpumped groundwater under prior law, the Act is sustainable under the police power.

ARGUMENT

I

THE PUBLIC INTEREST IN PRESERVING THE GROUNDWATER SUPPLIES AVAILABLE TO ALL LANDOWNERS WARRANTED THE FULL EXERCISE OF THE STATE'S POLICE POWER.

The Act does not take groundwater from landowner "A" or give groundwater to landowner "B" as petitioners assert. The Act imposes a comprehensive scheme for the regulation and management of the common groundwater resource that percolates beneath the lands of all landowners in each of the Active Management Areas. The Act applies uniformly to all lands within Active Management Areas for the common benefit. All existing uses of groundwater are allowed to continue. § 45-462. No one has been denied the right to commence new uses of groundwater. Everyone may qualify for new uses of groundwater on an equal basis by meeting the conditions

prescribed for those uses by the Act. See, e.g., §§ 45-454, 45-463.E, 45-473, 45-464.F, 45-471, 45-474, 45-492, 45-511 to 45-519, 45-576.

Unpumped groundwater cannot be identified to individual ownership or to separate parcels of land. The groundwater supply is a common resource of the entire basin. The rate of annual recharge in the Little Chino Valley Sub-basin of the Prescott Active Management Area is 3/100's of an acre foot per acre. (CR 37a App. R-5, Table II-1.) Typical urban uses in the Prescott AMA consume 1 acre feet per acre, 33 times the rate of replenishment. Typical irrigation uses consume 4 acre feet per acre, 133 times the rate of replenishment. (Id. App. A-2 at 2.)

This means that virtually every time a landowner in the Prescott AMA pumps from a well, he is withdrawing more water than the amount of replenishment attributable

to his land. Hence, it is almost a certainty that the landowner is withdrawing water not only from beneath his land but from beneath neighboring lands in the common basin as well. Thus, despite petitioners' assertion of the existence of an "ownership rights regime" under prior law, it is impossible for petitioners to identify what groundwater they own, what was allegedly taken away, and what requires compensation. To the contrary, petitioners, together with all other landowners in the basin, will share in an enduring benefit -- the stabilization of water levels and the long-term reliability of a water supply sufficient to sustain reasonable economic and social life indefinitely.

Respondents acknowledge that prior to the Act, petitioners had the ability to drill wells and pump water from their property at will, even to the extent of

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT

Petitioners' arguments before this Court turn upon three questions of Arizona law: 1) What was the nature of petitioners' interest in groundwater beneath their land prior to passage of the 1980 Act? 2) Did the 1980 Act require that land included within the Initial Active Management Areas satisfy one of the criteria for establishment of Subsequent Active Management Areas? and 3) Is the 1980 Act void because it operates by reference to maps of Initial Active Management Areas existing at the time the Act was passed and signed by the Governor, which maps were filed with the Secretary of State on that day as required by the Act?

On the first issue, petitioners contend that prior to the 1980 Act they owned a property interest in the unpumped

exhausting the common water supply of the entire basin, so long as it was used in connection with beneficial use of their land. (Petitioners' neighbors had a corresponding unrestricted ability to pump petitioners' lands dry.) But this ability derived solely from the bare existence of a scheme of law and was not a compensable property interest. Value that may derive from a particular legal regime does not ripen into an interest protected by the Constitution against diminution. Reichelderfer v. Quinn, 287 U.S. 315, 318-19 (1932). As the Court said in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130 (1978), "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

This Court has previously commented on the public importance that attaches to the management of a state's water resources. In Colorado River Water Conservation District v. United States, 424 U.S. 800, 804 (1976), this Court said, "[i]t is probable that no problem of the Southwest section of the Nation is more critical than that of scarcity of water." More recently, in the course of determining that Nebraska's restraint on exportation of groundwater discriminated against water users in other states, thereby imposing an unconstitutional burden on interstate commerce, this Court said:

> [A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens -- and not simply the health of its economy -- is at the core of its police power.

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982).

Clearly the welfare of the citizens of Arizona was at stake while the rate of groundwater pumping was allowed to accelerate without regulation and without restriction in the face of critical overdraft on the finite groundwater supply. Annual water consumption in Arizona is 4.8 million acre feet. Annual dependable surface and groundwater replenishment is only 2.8 million acre feet. The shortage is made up by the mining of groundwater. As noted above, groundwater depletion is now more than 7 times the rate of groundwater recharge. Water tables, which already range from typical depths of 350 to 400 feet throughout central Arizona, are dropping at rates of 4 to 14 feet per year. (CR 38 at 4-5.)

The Arizona Supreme Court sustained the Arizona Legislature's invocation of the police power in Chino Valley II. It quoted in full the following declaration of policy in § 45-401:

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state. [Emphasis added.] 131 Ariz. at 82-83, 638 P.2d at 1328-29.

Following this quotation, the Arizona court stated:

> We do not doubt but that the overdraft of groundwater in this state is a serious problem which has no chance of correcting itself, and that it is necessary for comprehensive legislation to both limit groundwater use and allocate its use among competing interests. 131 Ariz. at 83, 638 P.2d at 1329.

In Chino Valley II, the Arizona Supreme Court relied in part on this Court's decision in Agins v. City of Tiburon, 447 U.S. 255 (1980). The City of Tiburon was held to have had sufficient interest in protecting its residents from the ill effects of urbanization that it could limit the use of prime suburban land to one single-family house per acre. Under the tests discussed in Agins, the 1980 Act is clearly a valid exercise of the police power. In Agins, this Court considered:

1. Whether the ordinance will "substantially advance legitimate state interests." 447 U.S. at 260. In Sporhase, this Court said the legislative purpose to "preserve diminishing sources

of ground water . . . is unquestionably legitimate and highly important. . . . " 458 U.S. at 954. In the arid Western States, "the desirability of state and local management of ground water" has been "convincingly demonstrated." 458 U.S. at 952. In Chino Valley II the Arizona Supreme Court found that "[t]he 1980 Act furthers legitimate state interests." 131 Ariz. at 83, 638 P.2d at 1329.

2. Whether the ordinance will deny "an owner economically viable use of his land." 447 U.S. at 260. The 1980 Act allows all existing groundwater uses to continue subject to reasonable conservation requirements. Domestic wells, including new ones, are exempt from the Act. § 45-454. All landowners are entitled to apply for new uses of groundwater on the conditions specified by the Act.

3. Whether the ordinance "is, in essence, a determination that the public

at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." 447 U.S. at 260. This is clearly a situation in which the public at large shares the burdens (and benefits) of govermental regulation. Indeed, petitioners' assertions would require the compensation of every landowner in every Active Management Area before any restrictions could be placed on the development and use of groundwater.

4. Whether there is any indication that the complainants' tract will be the only property affected by the ordinances. 447 U.S. at 262. The 1980 Act applies statewide. The controls imposed in Active Management Areas are imposed uniformly to all lands included in the Active Management Areas.

5. Whether the complainants "will share with other owners the benefits and

burdens" of the exercise of the police power. 447 U.S. at 262. Undeniably petitioners, as members of the general public, will share the benefits of the Act. The Department of Water Resources is required to implement a management plan for the Prescott Active Management Area designed to achieve the goal of "safe yield" by the year 2025, meaning groundwater levels will no longer decline. §§ 45-563, 45-561.6, 45-562.A. The management plan is to include programs to augment water supplies and may also include programs to purchase and extinguish existing groundwater uses. §§ 45-565.A.4, 45-566.A.4 & 6, 45-567.A.4 & 6, 45-568. Yet even if, as petitioners contend, the provisions of the 1980 Act were to affect them more adversely than some other landowners, that would not be sufficient to overturn the Act. The impact felt by them though greater in

degree than that of the rest of the public, would be the same in kind. Reichelderfer v. Quinn, 287 U.S. 315, 320 (1932); Penn Central Transportation Co. v. City of New York, supra.

These tests, satisfied in Agins in the zoning context, are even more convincingly satisfied in the context of regulating use of a resource in short supply that is essential to human and economic life.[3]

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[3] This case is not at all like Kaiser Aetna v. United States, 444 U.S. 164 (1979), upon which petitioners rely, and Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Neither case involved regulation of the use of a common resource but involved actual physical invasion of the claimants' property by strangers.

Petitioners appear to rely on Midkiff v. Tom, 702 F.2d 788 (9th Cir.), prob. juris. noted, ____ U.S. ____, 104 S. Ct. 334 (1983), as an analogous fact situation illustrating that if the State "takes property from A and gives it to B," a taking has occurred. Not only was the issue in Midkiff different (i.e., whether a conceded taking was for a private or public purpose), but petitioners' own interpretation of Midkiff demonstrates that it is inapposite. Even if (Footnote continued)

The Arizona Supreme Court has previously sustained restrictions on groundwater pumping under the police power, relying on the pronouncements of this Court. In Southwest Engineering Co.

(Footnote 3 continued)

petitioners' premise were correct that an "ownership regime" existed in groundwater under Arizona law prior to the 1980 Act, there still would be no identifiable corpus of groundwater in the basin belonging to petitioners that could be the subject of compensation. Further, petitioners may qualify for new uses of groundwater from the common source on the same basis as any other landowner. It would also be impossible to determine to whom the water was given.

The remaining decisions cited by petitioners also provide little guidance. Among them is United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), which petitioners relied on heavily below. Yet Gerlach would defeat their case entirely. This Court, in determining the compensability of water rights taken by the construction of the Friant Dam, looked to state court decisions to determine whether plaintiffs' riparian rights were vested under California law. Even then, this Court noted that the rights taken in Gerlach were rights that were already being exercised, not the unexercised "rights" being claimed here. 339 U.S. at 751-52.

v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955), it held that the Legislature had acted within the proper scope of the police power in enacting the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5., which prohibited the drillihg of new irrigation wells in areas of the State lacking sufficient groundwater to sustain then existing irrigation uses. The Code effectively prohibited the irrigation of hundreds of thousands of acres of undeveloped land that had little or no value except for potential use for irrigated agriculture. The holding was based in part upon this Court's decision in Miller v. Schoene, 276 U.S. 272 (1928). There this Court upheld as a valid exercise of police power the Virginia Cedar Rust Act, which required destruction of red cedar trees to prevent the spread of plant disease to apple orchards. The Arizona Supreme Court

quoted this Court's statement in Miller that there was an unavoidable choice between preserving one class of property or another and that:

> there is, a preponderant public concern in the preservation of the one interest over the other. [Citing cases.] And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. [Citing cases.] 79 Ariz. at 410, 291 P.2d at 769, quoting 276 U.S. at 279-80.

The Arizona Legislature has not destroyed any class of property, as this Court in Miller v. Schoene said it may when forced to the choice. The 1980 Act allows all existing uses to continue and allows all landowners to qualify for new uses on the conditions prescribed by statute.

or "unpredictable" departure from prior law.

This Court has often declined to examine state law issues when the District Court and Court of Appeals have concurred in their determination, even if the Court might have reached a different conclusion in the absence of such guidance. This Court has said that federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position to determine how state courts would resolve such issues. E.g., Butner v. United States, 440 U.S. 48, 57-58 (1979); Bishop v. Wood, 426 U.S. 341, 345-47 (1976). See also Haring v. Prosise, ___ U.S. ___, 103 S. Ct. 2368, 2373 n.8 (1983).

The holdings of the Arizona Supreme Court, District Court and Court of Appeals are unassailable. This section of respondents' argument shows that those

II

LANDOWNERS HAVE NEVER OWNED UNPUMPED GROUNDWATER UNDER ARIZONA LAW. THE COURTS BELOW RULED CORRECTLY ON THIS ISSUE OF STATE LAW.

Petitioners, by their statement of the first two questions presented, begin from an unsound premise, i.e., prior to the 1980 Act a landowner "owned" the groundwater beneath his land under Arizona case law. This contention was rejected expressly by the Arizona Supreme Court in Chino Valley II, 131 Ariz. at 82, 638 P.2d at 1328. Absent a violation of due process, this Court regards as binding the highest state court's interpretation of its own opinions. Tibbs v. Florida, 457 U.S. 31, 46-47 (1982). Both the District Court, 543 F. Supp. at 1277-78, and the Court of Appeals, 716 F.2d at 692, reviewed Arizona case law and concluded that Chino Valley II was not a "startling"

decisions are in complete accord with prior Arizona law.

Petitioners' argument is based upon dictum in an early Arizona case that groundwater belongs to the owner of the land. The dictum was used solely to distinguish the use of groundwater from the use of surface water, surface water being governed by the law of prior appropriation. While it is clear that there is no right to rely upon dicta under Arizona law,[4] petitioners nonetheless characterize the dictum as a "governing

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[4] See, e.g., Hernandez v. Banco De Las Americas, 116 Ariz. 552, 555, 570 P.2d 494, 497 (1977); Catchpole v. Narramore, 102 Ariz. 248, 250, 428 P.2d 105, 107 (1967); Hernandez v. County of Yuma, 91 Ariz. 35, 36, 369 P.2d 271 (1962). This has been the rule since the territorial era. Friedman v. Suttle, 10 Ariz. 57, 63, 85 P. 726, 728 (1906). It is also the rule in this Court. NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 186-88 (1981); McDaniel v. Sanchez, 452 U.S. 130, 141 (1981); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

principle of Arizona law." (Pet. at 10.) Further, petitioners ascribe to this dictum a meaning that is contrary to the results and holdings of the Arizona groundwater rights cases.

Howard and Southwest Cotton

The source of the ownership dictum on which petitioners rely is Howard v. Perrin, 8 Ariz. 347, 353, 76 P. 460, 462 (1904), aff'd, 200 U.S. 71 (1906). The dictum was repeated in Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), as modified, 39 Ariz. 367, 7 P.2d 254 (1932). In both cases the water claimants had alleged appropriations from underground streams. Under Arizona law, surface and underground streams, as distinguished from percolating groundwater, are subject to the doctrine of

prior appropriation.[5] The nature of rights in groundwater was not involved in either case. Southwest Cotton expressly reserved determination of the nature of rights in groundwater for the future. 39 Ariz. at 83-84, 4 P.2d at 376.

Bristor II

The court in Bristor v. Cheatham (Bristor II), 75 Ariz. 227, 255 P.2d 173 (1953), adopted the reasonable use rule for percolating groundwater in Arizona. The mere adoption of that rule is inconsistent with the notion of ownership. The court assumed that it had a choice among different water doctrines other than prior appropriation, including the English rule,

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[5] Similarly, the dictum was used in Fourzan v. Curtis, 43 Ariz. 140, 29 P.2d 722 (1934), to distinguigh between water law doctrines in holding that the owner of land on which a grassy seep occurred was entitled to its use as percolating water, as against a neighboring landowner's claim that the seep was surface water subject to appropriation.

the reasonable use doctrine, and the correlative rights doctrine. It adopted a rule that both permitted and limited the right to use groundwater to amounts necessary for the beneficial use of land. The court's observation that what is a "reasonable use" changes with facts and circumstances and from time to time, 75 Ariz. at 237-38, 255 P.2d at 179-80, refutes the contention that a landowner owns the groundwater beneath his land. The court also noted the possibility of use of the police power by the Legislature to prevent the exhaustion of water supplies, citing Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908), and California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555 (9th Cir. 1934), aff'd, 295 U.S. 142 (1935), but declined to determine whether and to what extent the police power might be used, saying the issue would be decided when

properly presented. 75 Ariz. at 234-35, 255 P.2d at 177-78.

Southwest Engineering

Petitioners completely omit from their "representative sample of excerpts from decisions of the Arizona Supreme Court" (Pet. at 11.) any mention of Southwest Engineering Co. v. Ernst, 79 Ariz. 403, 291 P.2d 764 (1955), the one decision in which the Arizona Supreme Court did consider the contention that the landowner "owned" groundwater beneath his land. Moreover, Southwest Engineering is the Arizona decision most directly in point. There the Arizona court was presented with a challenge to the State's authority to restrict the use of groundwater by individuals. Further, the 1948 statute in dispute was similar to the 1980 Act in that it prohibited the drilling of new wells, other than replacement wells, for irrigation in areas of the State

designated as having insufficient water supplies at then existing rates of withdrawal. Although the 1948 statute was sustained under the police power, the Arizona Supreme Court said that the rule derived from Howard and Southwest Cotton was that as between individual users of groundwater, the doctrine of reasonable use would apply. But:

> Specifically the question was left open as to the right of the state against individuals to regulate the consumption of ground water in the interest of the general welfare. 79 Ariz. at 408, 291 P.2d at 767.

The plaintiff's assertion in Southwest Engineering that it "owned" the groundwater beneath its lands and that such property right was protected against confiscation by the Constitution was rejected. The Court said in part:

> The supply of ground water within the territorial boundaries of the state, or any particular groundwater basin therein, is not unlimited and even though in some instances the limits thereof may

be difficult to apprehend, ultimately and inevitably at one time or another it will become necessary to restrict the use merely because the available users and uses exceed the available supply. We do not doubt that it is the proper sphere of the legislature, in the interest of the general welfare, to say when that time has arrived by establishing the mechanics for its determination and upon such determination prescribing the economical consumption which constitutes the most efficient use of water. [Emphasis added.] Id. at 411, 291 P.2d at 770.

Anway

The issue in State ex rel. Morrison v. Anway, 87 Ariz. 206, 349 P.2d 774 (1960), was whether the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5, prohibited the defendants from irrigating land not previously cultivated. The fact that the court took as given that the Legislature could prohibit drilling new wells for irrigation is completely inconsistent with the petitioners' assertions here of ownership.

Jarvis

Likewise in Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385 (1969), ownership was not in issue. The issue was whether an undisputed transportation of groundwater by the City of Tucson injured the plaintiffs. The court found injury. It approved the concept of legislation allocating water use among competing water users by basing its opinion upon a state statute that preferred municipal uses over irrigation uses in considering competing applications to appropriate surface waters. (There was and still is no comparable groundwater preference statute in Arizona.)

FICO

Petitioners' next excerpt is from Farmers Investment Co. v. Bettwy (FICO), 113 Ariz. 520, 558 P.2d 14 (1976), but there the issue was not ownership of groundwater but whether the defendants'

uses of groundwater were "off the land" from which the groundwater was pumped and thus subject to injunction.

FICO renewed the invitation of Bristor II and Southwest Engineering, that the Legislature establish priorities among competing groundwater users. The court said it was not the function of courts to adjust water rights among existing users when there is not enough water to go around. That is the function of the Legislature:

> If it is to the State's interest to prefer mining over farming, then the Legislature is the appropriate body to designate when and under what circumstances such economic interest will prevail. [Emphasis added.] 113 Ariz. at 527, 558 P.2d at 21.

Chino Valley I

In Town of Chino Valley v. State Land Department (Chino Valley I), 119 Ariz. 243, 580 P.2d 704 (1978), the Arizona Supreme Court refused to hold unconstitutional the 1977 act that created the

Groundwater Management Study Commission to draft the 1980 Act. The Court approved the creation of the Commission and referred to its earlier statement in FICO:

> We stated that if one interest was to be preferred over the other, the Legislature was the appropriate body to designate which economic interest would prevail. [Emphasis added.] Id. at 245, 580 P.2d at 706.

Chino Valley II

Finally, in Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981), the Arizona Supreme Court said:

> We . . . hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water.

Summary

More than 50 years ago, the court in Southwest Cotton, supra, accompanied its holding that groundwater was not subject to the doctrine of prior appropriation

with the caveat that selection of the precise doctrine applicable to groundwater was reserved for future determination. When the Arizona Supreme Court first defined rights to the use of groundwater in 1953 by adopting the reasonable use doctrine in Bristor II, supra, it stated that all such rights may be subject to modification by the Legislature under the police power. The Legislature's exercise of the police power prohibiting increased pumping for irrigation was upheld almost immediately in Southwest Engineering Co. v. Ernst, supra. From that decision onward, the Arizona Supreme Court repeatedly stated that authority was reserved to the Legislature to allocate groundwater among competing uses and to prescribe which uses of groundwater are in the best interests of the general welfare of the State.

III

STATUTORY INCLUSION OF PETITIONERS' LAND IN AN ACTIVE MANAGEMENT AREA DID NOT VIOLATE PETITIONERS' RIGHT TO DUE PROCESS.

Petitioners attack the inclusion of their lands in the Prescott Active Management Area as a conclusive legislative presumption that their lands have one or more of the specific characteristics required to be shown for administrative designation of Subsequent Active Management Areas by the Director of the Department of Water Resources.[6]

Petitioners' premise is unsound. The Act does not require that Initial and Subsequent Active Management Areas meet

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[6] A Subsequent Active Management Area may be designated if the Director finds that: 1) Active Management is necessary to preserve the existing supply of groundwater for future needs; 2) land subsidence or fissuring is endangering property or potential groundwater storage capacity; or 3) use of groundwater is resulting in actual or threatened water quality degradation. § 45-412.A.

the same criteria. Their argument, which would require the Court to make an erroneous reading of a state statute, was heard and rejected without comment by both the District Court and the Court of Appeals.

Absent express provision in the Act, there is no constitutional precept that Initial and Subsequent Active Management Areas be established on the same conditions. The proper question under the due process clause is whether there existed any rational basis upon which the Legislature could have concluded that groundwater use in the Initial Active Management Areas should be managed. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

Although petitioners had the burden of showing that no rational basis existed for

the delineation of the Initial Active Management Areas,[7] they made no attempt to do so. Nor did they attempt to controvert evidence presented below that established several compelling reasons for the designation of those Management Areas. Petitioners have not even denied that these facts show a valid basis for legislative action. Several of these facts were noted by the District Court below, any one of which is sufficient to demonstrate that the Legislature acted

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[7] "It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.'" Hodel v. Indiana, 452 U.S. 314, 323 (1981). See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). The 1980 Act is clearly one that regulates business and "economic life." Domestic wells are generally exempt from all provisions of the Act except that they must be registered and drilled according to certain construction standards. §§ 45-402.7; 45-454.

reasonably and not arbitrarily. For example:

1. The Initial Active Management Areas include the State's major population centers (both existing and projected) that are dependent upon groundwater. Eighty percent of the State's population currently resides in Active Management Areas. The population of the Prescott Active Management Area is expected to nearly triple by the year 2025. (CR 37a at App. A-2, pp. 5-10.) 543 F. Supp. at 1278-1279, 1280.

2. Sixty-nine percent of the groundwater overdraft in the State occurs in Active Management Areas. (CR 37a at App. A-2, pp. 9-10.) 543 F. Supp. at 1278-1279, 1280.

3. The Arizona Water Commission projected an overdraft in the Little Chino Sub-basin of the Prescott Active Management Area of 6,000 to 7,000 acre

feet annually by the year 2020, assuming 4,000 acre feet of additional water is imported from the Colorado River. That projection does not consider the effect of increases in pumping in the Upper Agua Fria Sub-basin, where petitioners' lands are located. (CR 37a at App. R-5, pp. III-35-36, Table LC-1.)

4. Under the 1948 Groundwater Code, 1948 Ariz. Sess. Laws, 6th Spec. Sess., Ch. 5, certain areas of the State had been designated Critical Groundwater Areas pursuant to official administrative determinations by the Arizona State Land Department that groundwater supplies within those areas were insufficient to sustain existing uses. § 45-301.1 (Repealed 1980). Without exception, the aquifers or portions of the aquifers that supply every Initial Active Management Area had been included within Critical Groundwater Areas. (CR 37a at App. M1, M2,

M4 and M5.) 543 F. Supp. at 1280. Conversely, and without exception, every Critical Groundwater Area designated under prior law was included within either an Active Management Area or an Irrigation Non-Expansion Area. (Id.)

5. The former Granite Creek Critical Groundwater Area covered a substantial portion of the Prescott Active Management Area, primarily in the Little Chino Valley Sub-basin. (CR 37a at App. R-5, p. III-35.) Petitioners' lands in the Upper Agua Fria Sub-basin of the Prescott Active Management Area were not in the Granite Creek Critical Groundwater Area. (Appellants' Revised Opening Brief before the Court of Appeals at 47-48.) But several studies and maps prepared by public agencies pursuant to law showed that the Little Chino Valley and the Upper Agua Fria Sub-basins share a common groundwater aquifer. These agencies

included the United States Geological Survey, the Arizona Water Commission, and the Arizona Bureau of Mines at the University of Arizona. (CR 37a at App. M6 and App. A-3; CR 37a at App. M7; CR 37a at App. M8.) The Legislature's sole action in designating the Prescott Active Managment Area was to extend the critical area to encompass the entire groundwater basin, which is essential for effective management.

6. Former administrations and Secretaries of the Interior had threatened to withhold approvals necessary for construction of the Central Arizona Project to import water from the Colorado River to central Arizona, until the State had enacted a program for meaningful groundwater management. (See, e.g., CR 45 at App. A-6, pp. 4-5 and attachment.) It is understandable that the United States might not finance the development and

importation of additional water supplies to areas of the State where no controls on water use exist. Substantially all of the areas of the State that will receive CAP water deliveries, either directly or, as in the case of the Prescott area, by exchange, have been included in Active Management Areas. (Id. at 3.)

7. The Arizona Water Commission, directed by the Legislature and the Arizona Groundwater Management Study Commission to study groundwater supplies, demands and conditions throughout the State and to prepare management recommendations, had recommended management of all areas subsequently included in Initial Active Managment Areas. (CR 37a at App. R-2, pp. 1-2.)

Thus, valid legislative reasons existed for the designation of Initial Active Management Areas as they were delineated by the Legislature.

In simply determining that groundwater usage in certain areas of the State shall be managed, the Legislature made no presumptions of fact concerning petitioners or their lands. This case therefore is not even susceptible of irrebuttable presumption analysis. But even had facts been presumed, application of the doctrine appears limited to legislative presumptions that have infringed important personal liberties or benefits. The doctrine does not apply to statutes involving purely economic regulation. See Weinberger v. Salfi, 422 U.S. 749, 770-74 (1975); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

The three cases cited by petitioners all involved important personal freedoms, and were decided prior to Turner Elkhorn: Vlandis v. Kline, 412 U.S. 441 (1973) (student's right to travel held violated by statutory presumption that a student

with an out-of-state address when applying for college is a non-resident); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975)(unwed mothers presumed immoral and unfit to be hired as teachers' aides); Greene v. McElroy, 360 U.S. 474 (1959) (security clearance revoked without disclosing to the employee information upon which revocation was based).[8]

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[8] In the proceedings below, petitioners implied that there existed some constitutional mandate that different areas of the State be treated identically. As noted above, petitioners have abandoned their equal protection arguments. Nevertheless, the facts recited in the text show a valid legislative basis for treating Initial Active Management Areas differently from the rest of the State. Further, the Equal Protection Clause does not apply to classifications between geographic areas. McGowan v. Maryland, 366 U.S. 420, 427 (1961); Salsburg v. Maryland, 346 U.S. 545, 552 (1954); see Hodel v. Indiana, 452 U.S. 314, 332 (1981).

IV

MAPS, DEPICTING THE BOUNDARIES OF THE INITIAL ACTIVE MANAGEMENT AREAS, WERE IN EXISTENCE AND ON FILE WITH THE SECRETARY OF STATE ON THE DATE OF ENACTMENT, AND WERE VALIDLY INCORPORATED BY THE ACT.

Petitioners attack the Act as having been incomplete on the date of its enactment because it operates by reference to maps required to be on file with the Secretary of State on the effective date of the Act, which depict the Initial Active Management Areas. The Act states, "The boundaries of the initial active management areas are shown on the maps filed in the office of the secretary of state on the effective date of this chapter." § 45-411.B. Petitioners assert (without citation to the record) that the maps were not on file with the Secretary of State at the precise instant the Governor signed the bill but were filed

bill and the effective date of the Act. Petitioners also admitted this fact below (Id.) and here (Pet. at 22-23.).

Many legislative enactments must and do operate by reference to external documents. Respondents are not aware of any authority that the legislators must even see the items to which reference is made. Incorporation by reference is valid so long as the legislators intended the statute to incorporate or to operate by reference to those items and the items were in existence on the date of the enactment. See, e.g., State v. Williams, 119 Ariz. 595, 598-99, 583 P.2d 251, 254-55 (1978).[9]

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[9] State Compensation Fund v. De La Fuente, 18 Ariz. App. 246, 501 P.2d 422 (1972), relied upon by petitioners, has no application to the claim of defect petitioners urge upon this Court. Among other failings in the workman's compensation statute there involved, the statute did not refer to any source of guidance in existence at the time of its enactment.

later that same day. Petitioners therefore claim the Act was incomplete when it left the Legislature and that the maps had no existence at the time the bill was signed. The District Court and the Court of Appeals properly rejected this argument on the basis of common sense and the undisputed evidence.

That evidence, and indeed petitioners' admissions, establish that:

1. The maps were in existence prior to the enactment of the statute. Petitioners admitted this fact below:

"It is also clear that these maps were prepared in the office of the Arizona Water Commission by personnel of that state agency prior to June 12, 1980." (Petitioners' Motion for Summary Judgment, CR 31 at 68.)

2. The maps were delivered to the Secretary of State and filed on June 12, 1980, the date the Governor signed the

CONCLUSION

The petition should be denied.

RESPECTFULLY SUBMITTED this 12th day of March, 1984.

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CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition were served by hand-delivery on March 12, 1984 on counsel for petitioners at the following address:

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